

attorneys  
attorney fees  
employment  
professionals  
retainer(s) § 327(a)  
§ 328(a)  
§ 329  
§ 330(a)  
§ 331

In re Heritage Mall Associates, Case No. 694-64711-aer11;  
In re Downtown Albany Associates, Case No. 694-64712-aer11,

7/11/95 AER (published) 184 B.R. 128

The debtors, related companies, filed applications to employ as professionals, attorneys and an appraiser. The retainer agreements for both the attorneys and appraiser in both cases provided that the professionals received a retainer in each case which was described as "earned on receipt" or when received, subject to later application by the professionals to the court for approval of the reasonableness of fees. The agreement provided that the professionals would return any portion of the original retainer which exceeded the total services rendered or which the court later determines to have exceeded the reasonable value of the services provided.

The U.S. Trustee objected to the "pre-paid" or "earned on receipt" terms of the attorneys' application. After an initial hearing, the court approved the employment of the professionals but declined to rule on the reasonableness of the fees (including the pre-paid fees provision) until the professionals filed fee applications. The court entered an appropriate order. The UST then filed a motion to amend the order restating its objection to the "earned on receipt" nature of the retainer and arguing that the court should have approved all of the proposed terms and conditions of employment as part of the original application.

First, the court concluded that the UST was correct and that the court should not have approved the employment of the attorneys without approving the terms and conditions of the fee agreement between the attorneys and the debtors. Second, the court concluded that neither "classic retainers" nor "earned on receipt" or "advance payment" retainers are unethical or invalid per se in Oregon. Furthermore, it said, such retainers are not improper under bankruptcy law and do not circumvent the provisions of §§ 330 and 331.

Finally, the court stated seven factors which may be utilized to determine the "reasonableness" of such agreements: (1) whether

or not the case is an unusually large or complex one in which an exceptionally large amount of fees might accrue each month; (2) whether the court is convinced that waiting an extended period for payment would place an undue hardship on counsel; (3) whether the court is satisfied that the firm can respond if disgorgement is ordered; (4) the experience of the professional involved; (5) whether or not the professional has been precluded from accepting other employment in order to take the debtor's case; (6) the reasonableness of the amount of the portion of the retainer which is "earned on receipt"; and (7) whether the existence of the fee agreement was adequately disclosed to the court and other interested parties.

The court was satisfied that all of these requirements except (3) had been met and ordered further proceedings to make a determination of this factor.

1  
2  
3  
4  
5  
6  
7  
8 UNITED STATES BANKRUPTCY COURT  
9 FOR THE DISTRICT OF OREGON  
10

11 IN RE )  
12 )  
12 HERITAGE MALL ASSOCIATES, ) Case No. 694-64711-aer11  
13 )  
13 Debtor-in-possession. )  
14 )  
14 DOWNTOWN ALBANY ASSOCIATES, ) Case No. 694-64712-aer11  
15 )  
15 Debtor-in-possession. ) MEMORANDUM OPINION

16 This matter comes before the court upon the applications filed  
17 on behalf of the debtors-in-possession (debtors) to employ the law  
18 firm of Muhlheim, Palmer, Zennache' and Wade (the Firm) as  
19 attorneys to represent the debtors and the applications of the  
20 debtors to employ Charles P. Thompson (appraiser) as appraiser in  
21 these cases. The United States Trustee (UST) has filed objections  
22 to the employment of these professionals. The UST does not object  
23 to their employment, per se, rather, the UST objects to the  
24 proposed terms and conditions of their employment.  
25

26 **FACTS & PROCEDURAL BACKGROUND**

1           These are related cases. Heritage Mall Associates is a  
2 California limited partnership and is one of the general partners  
3 of Downtown Albany Associates, a California limited partnership.  
4 Heritage Mall Associates owns and operates the Heritage Mall  
5 located in Albany, Oregon. Downtown Albany Associates owns and  
6 operates an office building in Albany, Oregon. The debtors each  
7 filed a voluntary petition for relief under Chapter 11, herein, on  
8 December 20, 1994. On that same date, the debtors each filed an  
9 application to employ the firm to represent them in their  
10 respective Chapter 11 proceedings. Two days later, each debtor  
11 filed an application to employ appraiser as an appraiser in their  
12 respective cases.  
13

14           In each case, the firm received a retainer on December 14,  
15 1994. In each case the firm deposited the sum of \$25,000 into its  
16 general account for pre-payment of fees. The application for  
17 employment of attorneys in each case reveals that this deposit was  
18 made pursuant to the firm's written agreement with the respective  
19 debtors to treat the sum of \$25,000, in each case, as being earned  
20 when received. The Affidavit of Wilson C. Muhlheim in Support of  
21 Application for Employment of Attorneys indicates that:  
22

23           Pursuant to [the Firm's] agreement with the debtor  
24           [\$25,000] of the retainer [in each case] was treated as  
          earned when received subject to the following:

25           a. As in all chapter 11 cases, [the Firm] will  
26           submit an itemization of its fees and expenses to  
          the court for approval. The court will not allow  
          payment of any fees in addition to the retainer

1           until our time and expenses exceed the amount of our  
2           routine charges as described in the attached billing  
3           policy statement. Thereafter, the court will  
4           approve payment only of the amount by which our  
5           routine charges exceed the original retainer.

6                   b. If, upon completion of our services,  
7           our routine charges are less than the original  
8           retainer, or if the court approves final fees  
9           in an amount less than the original retainer,  
10          we will immediately refund the difference  
11          between the earned fee and the original  
12          retainer. (emphasis added)

13          p.2, lines 10-21.

14          The application to employ the appraiser indicates that the  
15          appraiser received a \$10,000 pre-paid appraisal fee in each case,  
16          from debtors, on December 16, 1994. In addition, the appraiser is  
17          to receive \$100 per hour for depositions, pre-trial conferences and  
18          court time, if necessary.

19          The UST filed objections to these applications. The UST did  
20          not object to the employment of the professionals, per se, however,  
21          the UST objected to the proposed terms and conditions of the  
22          professionals' employment. The thrust of the UST's objection is  
23          that the professionals should not receive any pre-paid or earned on  
24          receipt fees. In the case of the firm, all funds paid to the firm  
25          as a retainer must be placed in the firm's trust account until  
26          after application to and allowance by the court. Likewise, the UST  
27          objected to the appraiser receiving any pre-paid fees.

28          A hearing was held on January 13, 1995 at which time this  
29          court indicated that it would approve the employment of the firm

1 and the appraiser. This court further indicated that it was not  
2 ruling upon the reasonableness of any fees or the reasonableness of  
3 any pre-paid fees at that time. This was based upon the conclusion  
4 that such a ruling would be premature and that the question of the  
5 reasonableness of fees could be taken up when an appropriate  
6 application for compensation was before the court.

7 The order authorizing employment of attorneys was entered,  
8 herein, on January 17, 1995. It provides, in pertinent part, that  
9 employment of the firm as attorneys for the debtors is authorized  
10 and further provides "[T]hat compensation of said attorneys shall  
11 be subject to court review and compliance with the court's local  
12 procedures." Likewise, an order authorizing employment of the  
13 appraiser was entered on February 27, 1995 containing similar  
14 language.

15  
16 On January 27, 1995, the UST filed its Motions (1) For Ruling  
17 on the Objection, (2) To Alter or Amend Order Authorizing  
18 Employment of Attorneys, (3) For Amended or Additional Findings of  
19 Fact and Conclusions of Law<sup>1</sup>. The UST argues that this court was  
20 in error in declining to rule upon the proposed terms and  
21 conditions of the firm's employment maintaining that:

22 The terms and conditions of employment is a separate  
23 question from allowance of fees. Section 328(a)  
24 specifically requires the court to approve the terms and

---

25  
26 <sup>1</sup>The UST has not filed a similar motion to reconsider, alter  
or amend the order allowing the employment of the appraiser.

1 conditions. Where, as here, the terms are out of the  
2 ordinary, the court should rule on them at the front end.

3 United States Trustee's Memorandum in Support of Post-hearing  
4 Motions, p.3, lines 14-18.

5 The UST continues to maintain that "earned on receipt" or  
6 advance payment retainers are improper per se and should not be  
7 allowed. The UST contends that the agreement between the debtors  
8 and the firm is an attempt to improperly circumvent the  
9 requirements of the Bankruptcy Code requiring that the court  
10 approve and allow compensation.

#### 11 **QUESTIONS PRESENTED**

12 The following questions are presented by the UST's objection.

13 First, is this court required to approve the proposed terms  
14 and conditions of a professional's employment at the front end, as  
15 part of the application for employment, or was this court correct  
16 in its initial conclusion that such a ruling could be deferred  
17 pending this court's normal application and allowance procedures  
18 concerning fees?  
19

20 Second, is an "earned on receipt" or advance payment retainer  
21 invalid per se?

22 Third, if such a fee agreement is not invalid per se, what  
23 factors should the court consider to determine its reasonableness?

#### 24 **DISCUSSION**

25 All statutory references are to the Bankruptcy Code, Title 11  
26 U.S.C. unless otherwise indicated.

1       **Terms and Conditions of Employment:**

2           Section 1107(a) provides in pertinent part:

3           [A] debtor-in-possession shall have all the rights, . . .  
4           and shall perform all the functions and duties, . . . of  
5           a trustee serving in a case under this Chapter.

6           Section 328(a) provides in pertinent part:

7           The trustee, . . . with the court's approval, may employ  
8           or authorize the employment of a professional person  
9           under Section 327 or 1103 of this Title, as the case may  
10          be, on any reasonable terms and conditions of employment,  
11          including on a retainer, on an hourly basis, or on a  
12          contingent fee basis. Notwithstanding such terms and  
13          conditions, the court may allow compensation different  
14          from the compensation provided under such terms and  
15          conditions after the conclusion of such employment, if  
16          such terms and conditions prove to have been improvident  
17          in light of developments not capable of being anticipated  
18          at the time of the fixing of such terms and conditions.

19          The question of whether or not the terms and conditions of the  
20          proposed employment must be approved by the court, as a condition  
21          to employment, was considered by the court in In re Dividend  
22          Development Corporation, 145 B.R. 651 (Bankr. C.D. Cal. 1992).

23          There, the court held:

24               Section 328 conditions the employment of counsel under  
25               § 327 upon court approval of the reasonableness of that  
26               employment. Therefore, a determination as to the  
              reasonableness of a pre-petition agreement at the outset  
              of the case is a necessary condition to the employment  
              under § 327. Further, the authorization in § 328(a) to  
              modify fees "after conclusion of employment, if such  
              terms and conditions prove to have been improvident in  
              light of developments not capable of being anticipated at  
              the time of the fixing of such terms and conditions",  
              clearly anticipates that the court will make a  
              determination as to the reasonableness of a fee  
              arrangement at the beginning of a case.

145 B.R. at 655.



1           The rationale of Judge Ryan in In re Dividend Development  
2           Corporation is persuasive. Accordingly, I conclude that the UST's  
3           position in its motion to alter and amend is correct. This court  
4           should not have approved the employment of the firm without  
5           approving the fee agreement that had been entered into between the  
6           debtors and the firm as reasonable. Accordingly, this court must  
7           now consider whether or not the fee agreement between the debtors  
8           and the firm should be approved.

9  
10       **Earned on Receipt or Advance Payment Retainers**

11           The UST contends that "earned on receipt" retainers are  
12           invalid, per se, under Oregon law. Since an attorney may not  
13           ethically enter into such an agreement with a client or charge an  
14           advance payment for future services, outside of bankruptcy, such an  
15           arrangement should not be allowed in the context of a bankruptcy  
16           proceeding. A review of the Oregon law on this subject is,  
17           therefore, necessary.

18  
19       Oregon Law:

20           In its memorandum, the UST describes three different types of  
21           retainers.

22           The "classic retainer" which has been described as follows:

23           A retaining fee is a preliminary fee given to an attorney  
24           or counsel to insure and secure his future services, and  
25           induce him to act for the client. It is intended to  
26           remunerate counsel for being deprived, by being retained  
          by one party, of the opportunity of rendering services to  
          the other and receiving pay from him; and the payment of  
          such fee, in the absence of an express understanding to

1 the contrary, is neither made nor received in payment of  
2 the services contemplated. Its payment has no relation  
3 to the obligation of the client to pay his attorney for  
4 the services which he has retained him to perform. 7A  
5 C.J.S. Attorney and Client § 282 (1980) (quoted in In re  
6 C & P Auto Transport, Inc., 94 B.R. 682, 687 (Bankr. E.D.  
7 Cal. 1988). Such a retainer is typically modest in  
8 relation to the fees for actual services, is earned when  
9 paid and is not refundable.

10 Memorandum in Support of UST's Objection to Employment of  
11 Attorneys, p.2, lines 11-22.

12 The UST argues that the retainers in these cases are not "classic  
13 retainers". This argument is based upon Mr. Muhlheim's affidavit  
14 indicating that the retainers are for payment of bankruptcy-related  
15 services.

16 The second type of retainer is described by the UST as the  
17 "security retainer" which may be defined as follows:

18 A second type of retainer agreement between debtors and  
19 their attorneys provides that the retainer will be held  
20 by the attorneys to secure payment of fees for future  
21 services that the attorneys are expected to render.  
22 Under such a "security retainer," the money given to the  
23 debtors' attorney is not present payment for the future  
24 services. Rather, the retainer remains the property of  
25 the debtor until the attorney "applies" it to charges for  
26 services actually rendered; any unearned funds are turned  
over by the attorneys. . . .

27 In re McDonald Bros. Construction, Inc., 114 B.R. 989, 999 (Bankr.  
28 N.D. Ill. 1990)

29 According to the UST, the "security retainer" is "standard fare" in  
30 Oregon Chapter 11 practice. It is the only form of retainer which  
31 the UST acknowledges as valid under both Oregon law and the  
32 Bankruptcy Code.

1           The third type of retainer is defined in the UST's memorandum  
2 as the "advance payment retainer" which may also be described as an  
3 "earned on receipt retainer". This type of retainer arises in a  
4 situation. . .

5           [I]n which the debtor pays, in advance, for some or all  
6 of the services that the attorney is expected to perform  
7 on the debtor's behalf. This type of retainer differs  
8 from the security retainer in that ownership of the  
9 retainer is intended to pass to the attorney at the time  
of payment, in exchange for the commitment to provide the  
legal services.

10 In re McDonald Bros. Construction, Inc., 114 B.R. at 1000.

11           The UST maintains that D.R. 9-101(A) precludes an attorney  
12 from accepting an advance payment of fees, in other words, all  
13 payments made by clients with respect to future services must be  
14 treated as a "security retainer" and held in trust until the  
15 services are rendered.<sup>2</sup> The UST also relies upon In re Miller, 303

16  
17 <sup>2</sup>DR 9-101(A) provides, in pertinent part:

18           (A) All funds of clients paid to a lawyer or  
19 law firm, including advances for costs and  
20 expenses and escrow and other funds held by a  
21 lawyer or law firm for another in the course of  
22 work as lawyers, shall be deposited in one or  
more identifiable trust accounts in the state  
in which the law office is situated. . . .No  
funds belonging to the lawyer or law firm shall  
be deposited therein except as follows:

23           (1) Funds reasonably sufficient to pay  
account charges may be deposited therein.

24           (2) Funds belonging in part to a client  
25 and in part presently or potentially to the  
26 lawyer or law firm must be deposited therein  
but the portion belonging to the lawyer or law  
firm may be withdrawn when due unless the right

(continued...)

1 Or. 253, 735 P.2d 591 (1987), OSB Legal Ethics Opinion 1991-88 and  
2 The Ethical Oregon Lawyer, § 15.6 (Oregon CLE 1991).

3 A close review of the Oregon authorities reveals, however,  
4 that "classic retainers" and "earned on receipt" or "advance  
5 payment" retainers are not unethical or invalid per se. This issue  
6 is addressed in the May, 1994 edition of the Oregon State Bar  
7 Bulletin in the PLF Update in an article written by Barbara S.  
8 Fishleder wherein she states at page 33: "Although non-refundable  
9 fees are not prohibited in Oregon, lawyers who use this fee  
10 arrangement frequently find themselves accused of charging  
11 excessive fees or of failure to refund unearned fees." She refers  
12 to two Oregon Supreme Court cases touching upon this subject. In  
13 re Biggs, 318 Or. 281, 864 P.2d 1310 (1994; In re Gastineau, 317  
14 Or. 545, 857 P.2d 136 (1993).

16 In Gastineau, the Oregon Supreme Court concluded that:

17 [A] lawyer violates DR 2-106(A) when he or she  
18 collects a nonrefundable fee, does not perform or  
19 complete the professional representation for which the  
20 fee was paid, but fails promptly to remit the unearned  
21 portion of the fee. . .

22 857 P2d at 140.

23 In Biggs, the Oregon Supreme Court noted:

24 <sup>2</sup>(...continued)

25 of the lawyer or law firm to receive it is  
26 disputed by the client in which event the  
disputed portion shall not be withdrawn until  
the dispute is finally resolved. (emphasis  
added)

1 Without a clear written agreement between a lawyer and a  
2 client that fees paid in advance constitute a non-  
3 refundable retainer earned on receipt, such funds must be  
4 considered client property. . .

864 P2d at 1316.

5 Here, it is undisputed that the firm has a clear written agreement  
6 with the debtors describing the fee agreement and describing that  
7 portion of the retainer in each case which is "earned when  
8 received."

9 The cases make it clear that if the fees are not ultimately  
10 earned by the attorney's performance, that any unearned fees must  
11 be refunded. Nonetheless;

12 Money paid to an attorney under a clear and specific  
13 written non-refundable fee agreement is the attorney's  
14 money, even before any work is done. For this reason,  
15 the money does not belong in the lawyer's trust account.  
The money must be put into the lawyers general account.

16 Oregon State Bar Bulletin, May, 1994, p.33.

### 17 **Bankruptcy Law**

18 Section 328(a) provides that the court may allow the  
19 "[E]mployment of a professional person. . .on any reasonable terms  
20 and conditions of employment,. . ." Reasonableness has been held  
21 to be a question of bankruptcy law, and not state law. In re  
22 Printing Dimensions, Inc., 153 B.R. 715 (Bankr. D. Md. 1993); In re  
23 Dividend Development, Corporation, 145 B.R. 651 (Bankr. C.D. Cal.  
24 1992); In re NBI, Inc., 129 B.R. 212 (Bankr. D. Colo. 1991); In re  
25 C & P Auto Transport, Inc., 94 B.R. 682 (Bankr. E.D. Cal. 1988).

26 Section 330(a)(1) provides as follows:

1 After notice to the parties in interest and the United  
2 States trustee and a hearing, and subject to sections  
3 326, 328, and 329, the court may award to a trustee, an  
4 examiner, a professional person employed under section  
5 327 or 1103-

6 (A) reasonable compensation for actual, necessary  
7 services rendered by the trustee, examiner,  
8 professional person, or attorney and by any  
9 paraprofessional person employed by any such person;  
10 and

11 (B) reimbursement for actual, necessary expenses.  
12 (emphasis added)

13 Section 331 provides:

14 A trustee, an examiner, a debtor's attorney, or any  
15 professional person employed under section 327 or 1103 of  
16 this title may apply to the court not more than once  
17 every 120 days after an order for relief in a case under  
18 this title, or more often if the court permits, for such  
19 compensation for services rendered before the date of  
20 such an application or reimbursement for expenses  
21 incurred before such date as is provided under section  
22 330 of this title. After notice and a hearing, the court  
23 may allow and disburse to such applicant such  
24 compensation or reimbursement. (emphasis added)

25 In reliance on the above statutes, the UST maintains that all  
26 retainers are property of the bankruptcy estate and must be held in  
trust until fees have been approved by the court based upon  
application and allowance, after notice and an opportunity for a  
hearing. "Classic retainers" and "advance payment retainers" are,  
therefore, impermissible under bankruptcy law , even if they would  
be allowed under Oregon law, as they serve to improperly circumvent  
the provisions of §§ 330(a)(1) and 331 cited above. A number of  
cases support the position taken by the UST. See, In re NBI,

1 Inc., 129 B.R. 212 (Bankr. D. Colo. 1991); In re C & P Auto  
2 Transport, Inc., 94 B.R. 682 (Bankr. E.D. Cal. 1988) and In re  
3 Printing Dimensions, Inc., 153 B.R. 715 (Bankr. D. Md. 1993).

4 The court in In re McDonald Bros. Construction, Inc., 114 B.R.  
5 989 (Bankr. N.D. Ill. 1990), however, reached the opposite result.  
6 There, the attorneys received a \$12,500 pre-petition retainer under  
7 a fee agreement very similar to the one involved in these cases.  
8 There, the court noted:

9  
10 In order for a prepetition retainer held by debtor's  
11 counsel to be property of the estate, the debtor must  
12 have some interest in the retainer itself at the time the  
13 petition is filed. . . It is certainly true that the court  
14 may order a return of any funds paid to a debtor's  
15 counsel, within the scope of section 329(a), upon a  
16 finding that the payment was excessive. However, the  
17 possibility of this return does not give the debtor an  
18 interest in the transferred funds at the time the case is  
19 commenced. It merely gives the estate a potential claim  
20 against the transferee. . . .

21 Thus, the Bankruptcy Code does not render all pre-  
22 petition retainers held by debtor's counsel property of  
23 the estate.

24 114 B.R. at 996, 997.

25 The court, in McDonald, indicated that the protections afforded by  
26 § 329 are adequate to safeguard the interests of creditors and  
other interested parties and to retain sufficient control by the  
court over fees paid by a debtor to its attorneys. Section 329  
provides as follows:

(a) Any attorney representing a debtor in a case under  
this title, or in connection with such a case, whether or  
not such attorney applies for compensation under this  
title, shall file with the court a statement of the

1 compensation paid or agreed to be paid, if such payment  
2 or agreement was made after one year before the date of  
3 the filing of the petition, for services rendered or to  
4 be rendered in contemplation of or in connection with the  
case by such attorney, and the source of such  
compensation.

5 (b) If such compensation exceeds the reasonable value of  
6 any such services, the court may cancel any such  
agreement, or order the return of any such payment, to  
the extent excessive, to -

7 (1) the estate, if the property transferred -

8 (A) would have been property of the estate; or

9 (B) was to be paid by or on behalf of the  
10 debtor under a plan under chapter 11, 12, or 13  
11 of this title; or

12 (2) the entity that made such payment.

13 In In re Dividend Development Corp., 145 B.R. 651 (Bankr. C.D.  
14 Cal. 1992) the court noted:

15 In summary, the Bankruptcy Code does not preclude a  
16 debtor's counsel from receiving an earned on receipt  
17 retainer if such an arrangement is permissible under  
18 state law. However, an earned on receipt retainer  
otherwise allowable under state law is subject to the  
bankruptcy court's review for reasonableness.

19 145 B.R. at 657.

20 The Bankruptcy Appellate Panel of the Ninth Circuit in In re  
21 Knudsen Corporation, 84 B.R. 668 (9th Cir. BAP 1988) affirmed a  
22 decision of the Bankruptcy Court of the Central District of  
23 California allowing an application procedure whereby professionals  
24 employed by the debtor and the creditors' committee would be paid  
25 on a monthly basis without prior court approval of billing  
26



1 statements. The reasoning of the appellate panel is particularly  
2 persuasive.

3 We disagree, however, that sections 330 and 331  
4 absolutely prohibit the transfer of funds to  
5 professionals prior to compliance with those  
6 sections. . . .[T]he trustee ignores the problem, arising  
7 especially in large cases, that when counsel must wait an  
8 extended period for payment, counsel is essentially  
9 compelled to finance the reorganization. This result is  
10 improper and may discourage qualified practitioners from  
11 participating in bankruptcy cases; a result that is  
12 clearly contrary to Congressional intent.

13 84 B.R. at 671, 672.

14 This court is persuaded that the reasoning employed by the  
15 courts in McDonald, Dividend Development Corporation and Knudsen is  
16 the better-reasoned view. Section 329 adequately protects the  
17 interests of the estate and other interested parties and preserves  
18 the full authority of the court to monitor and approve the fees  
19 paid by the debtors to the firm, appraiser and other professionals.  
20 Indeed, adoption of the position urged by the UST would render the  
21 provisions of § 329 largely superfluous. "Earned on receipt" or  
22 "advance payment retainers" as well as "classic retainers" are not  
23 absolutely prohibited under either the Bankruptcy Code or the law  
24 of the State of Oregon.

#### 25 **Factors to be Considered.**

26 Having determined that earned on receipt and classic retainers  
are not absolutely prohibited, it is appropriate for this court to

1 set forth factors which may be utilized to determine the  
2 "reasonableness" of the agreements set forth in these cases.

3 Some of the factors announced by the Bankruptcy Appellate  
4 Panel in Knudsen appear to be appropriate. They include the  
5 following:

6 1. Whether or not the case is an unusually large or complex  
7 one in which an exceptionally large amount of fees might accrue  
8 each month;

9 2. The court is convinced that waiting an extended period for  
10 payment would place an undue hardship on counsel; and

11 3. The court is satisfied that the firm can respond if  
12 disgorgement is ordered.

13 The court, in Dividend Development Corporation, has suggested  
14 some additional factors which may be appropriate including:

15 (4) The experience of the professional involved; and (5) Whether  
16 or not the firm or other professionals have been precluded from  
17 accepting other employment in order to take the debtor's case.

18 In addition, this court believes that, an "earned on receipt  
19 retainer" agreement should be scrutinized, on a case by case basis,  
20 to determine; (6) If that portion of the retainer which is "earned  
21 on receipt" is reasonable in its amount. In other words, in order  
22 to be reasonable, the "earned on receipt" portion of the retainer  
23 should be a sum which is likely to be less than the total amount of  
24 fees awarded in the case. If it appears likely, that the fees to  
25  
26

1 be awarded will be less than the "earned on receipt retainer", then  
2 the amount of the retainer may be unreasonable and excessive.  
3 Finally, (7) The existence of the fee agreement must be adequately  
4 disclosed to the court and other interested parties.

5 The court, in Dividend Development Corporation, noted, as  
6 urged by the UST in these cases, that the burden is upon the  
7 applicant to demonstrate the reasonableness of the proposed fee  
8 agreement. This court agrees.

9  
10 Applying the factors set forth above, to the fee agreements  
11 before the court in these cases, I find the following:

12 The nature of the fee agreement was adequately disclosed by  
13 the debtors in the applications to employ the firm as their counsel  
14 in these cases as set forth in the Affidavit of Wilson C. Muhlheim  
15 in Support of Application for Employment of Attorneys and other  
16 supporting documentation.

17 The expertise or the ability of the firm to represent the  
18 debtors in these cases was not questioned by the UST. In addition,  
19 the exhibits introduced at the January 13, 1995 hearing included a  
20 firm resume' which satisfies this court that the firm is well  
21 qualified to represent the debtors.

22 In the DIP's Response to U. S. Trustee's Objection to  
23 Employment of Attorneys (the firm's memorandum) filed January 12,  
24 1995, the firm argues persuasively that acceptance of these cases  
25 requires that the firm give up other employment opportunities. The  
26

1 reorganization profile filed in the Heritage Mall Associates case  
2 shows a number of creditors including secured creditors, Cigna  
3 Corporation, with a claim of over \$13,000,000 and Kearney Street  
4 Real Estate Company, with a claim exceeding \$8,000,000. The major  
5 asset of this debtor, the mall, is shown as having a liquidation  
6 value of \$15,000,000 and a reorganization value of \$17,000,000.  
7 The schedules filed in Downtown Albany Associates reveal that the  
8 major asset of the debtor, the office building, is valued at an  
9 amount exceeding \$4,000,000, subject to the secured claims of  
10 Kearney Street Real Estate Company for an amount exceeding  
11 \$4,000,000. This court is satisfied that the firm's agreement to  
12 represent the debtors in these cases, precludes the firm from the  
13 potential representation of the major secured creditors in these  
14 cases and that the amount of time required to effectively represent  
15 the debtors, in essence requires the firm, as a practical matter,  
16 to forego employment in other cases.

17  
18 The firm argues persuasively, that the normal procedure  
19 followed for interim compensation, will produce an undue hardship  
20 upon the firm and require the firm, in essence, to finance the  
21 reorganization to a large extent. By the time an interim fee  
22 application is processed and heard, if necessary, some of the fees  
23 allowed to the firm may be compensation for work performed as much  
24 as six months earlier.  
25  
26

Given the nature of the cases, the value of the assets held by the debtors, the size of the secured claims as liens on these assets and a review of actions already taken by the firm in these cases on behalf of the debtors, it is apparent that, and this court concludes, that the amount of the "earned on receipt retainer" is a reasonable amount in each case. It is highly likely that the firm will ultimately be allowed fees far in excess of the \$25,000 received by the firm in each case. The cases are sufficiently complex to justify the fee agreement that has been entered into between the debtors and the firm.

This court is not able to conclude, however, that the firm could respond by disgorgement of the retainers if eventually ordered to do so by this court. The UST has not questioned the solvency or ability of the firm to respond if disgorgement is ordered. The UST has argued, however, and this court agrees, that the burden is upon the applicant to establish the necessary factors which would enable this court to conclude that the fee agreement is reasonable. No evidence or representations have been presented to this court concerning the firm's financial status. Since the parties were not aware, before the issuance of this opinion, that such evidence or representations would be required, further proceedings are necessary to completely resolve this matter.

## CONCLUSION

Based upon the foregoing, this court concludes that the position taken by the UST in its post-hearing motions is correct insofar as it is necessary for this court to approve, not only the employment of professionals, but also the proposed terms and conditions of their employment as part of the process whereby the debtors apply to employ the firm to represent them. This court also concludes that "earned on receipt retainers" are not absolutely prohibited, either by the Bankruptcy Code or by Oregon law. Rather, such agreements need to be scrutinized on a case by case basis, applying the factors set forth by the court above.

This opinion shall constitute the court's findings of fact and conclusions of law; they shall not be separately stated.

ALBERT E. RADCLIFFE  
Bankruptcy Judge